SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

THOMAS JOHN, derivatively on behalf of DUTCHESS GARDENS REALTY, LLC

plaintiff,

-against-

GEORGE VARUGHESE, C.P.A,

defendant.

----------X

Index No:
Date Purchased:

Plaintiff designates Nassau County as the place of trial

SUMMONS

The basis of venue is plaintiff's principal place of business: 27 Royal Way, Manhasset Hills, NY. County of Nassau.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this Summons, to serve a Notice of Appearance, on the Plaintiff's attorneys within twenty (20) days after the service of this Summons, exclusive of the day of service (or within thirty (30) days after service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: Carle Place, New York
April 13, 2015

STEVEN COHN, P.C.
Attorneys for plaintiff Thomas John, suing derivatively on behalf of Dutchess Gardens Realty, LLC

By: _____
JEFFREY H. WEINBERGER

One Old Country Road, Suite 420
Carle Place, New York 11514
Ph: (516) 294-6410

Defendant's Address:
George Varughese, C.P.A
27 Royal Way
Manhasset Hills, New York 11040

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

THOMAS JOHN, derivatively on behalf of DUTCHESS GARDENS REALTY, LLC,	:	
	:	Index No. _____/2015
plaintiff,	:	
-- against --	:	
	:	**VERIFIED COMPLAINT**
GEORGE VARUGHESE, C.P.A.,	:	
defendant.	:	

PLAINTIFF THOMAS JOHN, suing derivatively on behalf of Dutchess Gardens Realty, LLC, a New York State limited liability company, by his undersigned attorneys, as and for his Complaint allege as follows:

1. Dutchess Gardens Realty, LLC (the "Company") is a New York limited liability company, with its principal place of business originally located at 54-05 Roosevelt Avenue, Woodside, NY, and currently 27 Royal Way, Manhasset Hills, NY.

2. Plaintiff Thomas John is a resident of Nassau County, NY. John is the Company's majority Member, with thirty-five percent (35%) equity and voting interests therein.

3. Upon information and belief, defendant George Varughese ("Varughese") is a New York citizen residing at 27 Royal Way, Manhasset Hills, NY. Varughese is an eight percent (8%) Member of the Company, and has been the Managing Member since November 2009.

Nature of action:

4. This derivative action is brought on behalf of the Company against Varughese, for waste, mismanagement, gross negligence, breach of fiduciary duty, and an accounting.

5. The Company's Members have authorized John in writing to commence this action on its behalf.

6. Demand has not been made on Varughese to cure the acts or omissions alleged below, or to provide access to the Company's records still in his possession, because prior attempts to obtain such information, and/or information relating to his conduct as Managing Member have been unsuccessful. Further, the actions and inactions for which Varughese believed to be responsible are by now incurable. Further demand would thus be futile.

Background:

7. The Company was formed in December 1999 for the purpose of purchasing and operating a retail "strip" mall known as Dutchess Plaza, located at 1189 Route 9, Wappingers Falls, NY (the "Property"). The Property was comprised of sixteen (16) retail establishments.

8. The Company had an initial capitalization of approximately $1.0 million.

9. The Company's purchase of the Property closed on February 14, 2000, at a price of approximately $4.4 million. Of that price, $3.6 million was paid by a secured loan (the "Loan") in favor of Intervest National Bank ("Intervest"), plus $800,000 in cash. Closing costs of approximately $200,000 were also paid in cash, bringing the Company's total expense for the acquisition to approximately $4.6 million.

10. Additionally, John personally guaranteed the Company's loan from Intervest, which was secured by a first mortgage in the amount of $3.6 million (the "First Mortgage").

11. On or about September 15, 2003 the Company refinanced the Loan, borrowing an additional $1,108,132.21 to bring its total outstanding debt $4.5 million. John personally guaranteed this additional amount, as he had with the First Mortgage.

12. On or about April 16, 2008, the Company gave Intervest a second mortgage on the Property in the amount of $330,817.39 (the "Second Mortgage"). As with the prior financings, John also personally guaranteed the Second Mortgage.

13. As the Company's majority Member at the time of its formation, and with prior experience in property management, John assumed the role of Managing Member, with the Members' approval.

14. John continued as Managing Member until November 2009, when Varughese volunteered to take on that role, representing in material part to the Members that he had sufficient managerial experience to maximize the Property's operating performance. Based on these representations, the Company's other Members approved Varughese's appointment as Manager. John acquiesced to this decision without protest.

The Fire:

15. On May 31, 2011, a fire originating in one of the Property's retail spaces destroyed three other stores (the "Fire"), causing what eventually became an unrestored loss of rental income, diminishment of the Property's intrinsic value, and impairment of Intervest's collateral for the First and Second Mortgages.

16. The Fire and its ensuing damage to the Property all occurred on Varughere's watch, as Managing Member. As set forth below, Varughese failed to disclose the Fire to any of the Company's Members. Varughese's acts and omissions in addressing that damage, among other things, are the basis for the derivative claims brought against him in this action.

(iv) failure to maintain fire insurance coverage:

17. At the time of its formation, the Company had acquired hazard insurance with Catlin Insurance Company, Inc. ("Catline"), under Policy No. F-I-2203-0611 (the "Policy").

18. The Company's acquisition and maintenance of sufficient hazard insurance was a material covenant by the Company to Intervest, in the First Mortgage and Second Mortgage.

19. Unbeknownst to any of the Company's Members (including John), Varughese had allowed the Policy to lapse as of October 10, 2010 – nearly seven months before the Fire.

20. It was not until June 2013 that the Members learned not only about the Fire, but also that Catlin had cancelled the Policy. In that regard, only then did the Member also learn that the Policy was cancelled because Varughese had failed to follow certain mandatory "loss control recommendations" issued by Catlin as to a chimney structure at one of the Property's tenants.

21. Upon information and belief, Catlin's "loss control recommendations" could have been implemented at a nominal cost. Instead, by reason of Varughese's grossly negligent conduct, the Company incurred not only the loss of intrinsic and income-generating value set forth above, but also the Policy's rent coverage benefits had he not allowed it to be canceled and then failed to reinstate or replace it.

22. Varughese had actual notice that Catlin was discontinuing the Policy by reason of failure to comply with its loss control recommendations. That notice came in three forms: (i) direct notification from Catlin, (ii) a returned premium check in the amount of $5,237, which Catlin could not deposit because it had already cancelled the Policy, and upon information and belief, (iii) routine, ordinary-course inquiries from Intervest as to the impairment of its collateral.

23. Notwithstanding Varughese's awareness of the Policy's cancellation, he took no corrective measures to have it reinstated, or to acquire new hazard insurance. By reason thereof, the Company had no insurance coverage in place as of May 31, 2011 -- the day of the Fire.

24. According to records since obtained from Catlin, the Company's fire insurance coverage was not reinstated until June 16, 2011 – sixteen days after the Fire.

25. Upon information and belief, Varughese deposited the returned premium check from Catlin (¶ 22 above). However, he never reported that deposit, his causing of the Policy to lapse, or the Fire itself, in any written disclosure to the Company's Members.

26. Instead, Varughese willfully failed to disclose to the Members: (i) that the Fire had even occurred, and (ii) that the Company's insurance had been cancelled seven months earlier, on his watch (¶ above), and (iii) that he had failed to take corrective action to either have the Policy reinstated or acquire replacement coverage.

Foreclosure:

27. Intervest eventually sold the Company's First and Second Mortgages (the "Company Debt"), which were later assigned to VFC Partners 4, LLC ("VFC Partners"). On or about February 25, 2013, VFC Partners brought an action to foreclose on the Property for nonpayment of the Company Debt (among other reasons), entitled *VFC Partners 4 LLC v. Dutchess Gardens Realty, LLC, et al.*, Dutchess County Index No. 1177/13 (the "Foreclosure Action").

28. Varughese failed to notify the Members of the Foreclosure Action when it was commenced, or thereafter, including at a Special Meeting convened by him in writing for May 26, 2012 (¶¶ 29-32 below).

Exclusion of John from Special Meeting of Members:

29. By letter dated May 21, 2013, sent to the Members by U.S. mail, Varughese called for a special meeting on Sunday May 26, 2013 at Rajadhani Restaurant, 206-12 Hillside Avenue, Hollis, NY at 6:30 pm (the "Meeting"). The letter stated in pertinent part (italics added):

> At the meeting we will be discussing the operation of the shopping center. Our mortgage matured in May of 2011 and [is] need of refinance. We have been paying interest only for the past two years and [the] mortgage holder is willing to sell the mortgage at a discount under a foreclosure threat. If we can raise 2.5 million, we can buy the mortgage and fix the plaza. *We are free from all*

> *accumulated liabilities* except the claims inserted by Thomas John's creditors. It is imperative that all of you attend the meeting to discuss the future operations and the solution to [its] pressing issues.

30. Upon information and belief, the Meeting was the first and only meeting of the Company's Members which Varughese had ever called in his role as Manager.

(i) <u>Material omissions from notice of Special Meeting</u>:

31. Varughese's letter to the Members did not even mention the Fire, which had occurred on May 31, 2011 -- nearly two years to the date of his letter. Nor did his letter mention the Foreclosure Action, which had been started on February 25, 2013 – only three months earlier.

32. Further, upon information and belief, Varughese failed to disclose at the Meeting: (i) the Fire, (ii) that he had allowed the Policy to lapse seven months earlier, (iii) that he had failed to cause the Policy to be reinstated during the next seven months, (iv) the Fire's damage to the Property, (v) the Fire's impairment of Intervest's collateral for the First and Second Mortgages, or even (vi) the Foreclosure Action.

33. By reason thereof, Varughese's representation in his letter calling for the Meeting that "*[w]e are free from all accumulated liabilities*" was an intentional misrepresentation, which could only have been made with the specific intent to deceive the Members into a false sense of security as to his competence in managing the Company's operations.

(ii) <u>exclusion of John from the Meeting</u>:

34. According to the postmark on the envelope received by John, Varughese's May 21, 2013 letter to the Members calling for the Meeting on May 26 (a Sunday) was not even mailed to John until the afternoon of May 24, 2011 (only the previous Friday). This last-minute mailing ensured that John would be unaware of the Meeting in time to attend, and to pose questions to Varughese about the Company's operations in front of the other Members.

(iii) improper notice of Meeting:

35. Further and in any event, Article IV, Section 2 of the Company's Operating Agreement requires that all calls for special meetings be made on ten (10) days' written notice to all Members. Thus, even if Varughese's letter had been mailed to John on the same day that it was mailed to all other Members (May 21, 2013), calling for a meeting on May 26, the Members themselves received less than five days' notice, in violation of the Operating Agreement.

The spreadsheet:

36. Upon information and belief, the Meeting did take place on May 26, 2011. John has since been shown a certain spreadsheet which Varughese circulated to the Members in attendance, purporting to depict a consolidated financial statement for the Company's operations since he took over as Manager in November 2009 (the "Spreadsheet").

37. The Spreadsheet, which is undated, includes columns describing income earned and expenses incurred by the Company during: (i) November and December 2009, (ii) 2010, 2011 and 2012, and (iii) the five-month period January through May, 2013. It did not provide monthly breakdowns of the Company's income and expenses, nor has Varughese ever provided such data.

38. Upon information and belief, the Spreadsheet is the only disclosure that Varughese has ever provided to the Company's Members since he became Manager in November 2009.

39. Despite the absence of any other financial disclosures, according to the Spreadsheet Varughese has billed the Company a total of $63,493.56 in "management fees" since taking over as Manager in November 2009, including $18,220.56 in 2010 and $25,500 in 2012.

(i) "red flags" --

40. In addition to its missing documentation and calculations, and monthly breakdowns of operating data, the Spreadsheet contains several "red flags," including but not limited to:

(i) an unexplained "tax penalty" of $9,381.21 in 2012;

(ii) corporation tax penalties" of $175 in 2010, 2011, 2012 and 2013;

(iii) a $20,000 loan by the Company in 2010, disguised as an accounting fee and never repaid;

(iv) $37,000 in accounting fees charged for purported accounting services never performed – by Varughese, his accounting firm, or an outside firm;

(v) no entry for security deposits collected from new tenants (or increased security deposits from existing tenants based on rent escalations);

(vi) no entry for common-area-maintenance ("CAM") charges and tenants' property tax contributions required in their leases;

(vii) $44,642 in unexplained legal expenses since 2010; and

(viii) No disclosure of the $5,237 insurance premium returned by Catlin in November 2010, seven months before the Fire.

(ii) material omissions --

41. In addition to the foregoing irregularities, the Spreadsheet made no disclosure of: (i) the Fire, (ii) Catlin's cancellation of the Policy in November 2010, (iii) Varughese's failure to cause the Policy to be reinstated before the Fire in May 2011; and/or (iv) the Fire's financial effect on the Company's operations.

42. Varughese also misrepresented the Foreclosure Action to the Members in his May 21, 2013 letter calling for the Meeting as merely a "threat" (¶ 29 above), and failed to disclose the Foreclosure Action in the Spreadsheet or at the Meeting itself. Upon information and belief, these material omissions were specifically intended to deceive the Members as to Company's actual fiscal condition.

Avoidance of meaningful disclosure:

43. As set forth above, John was purposefully excluded from the Meeting. John therefore had no opportunity to question Varughese about the Spreadsheet in the presence of other Members, who in turn were deprived of the benefit of John's insight into their appropriate expectations as to property management and financial reporting.

44. Upon information and belief, Varughese's exclusion of John from the Meeting was done purposefully, and specifically with the intent of preventing him from asking questions about the Spreadsheet, in the presence of other Members.

45. Upon information and belief, Varughese signed all of the Company's income tax returns during the period in which he was acting as Manager of operations, without specific authority from the Members. Further, upon information and belief, although he himself is a certified public accountant, and had represented himself as possessing that credential in 2009 upon seeking appointment as Manager, Varughese assigned the accounting work for the Company's tax returns to an outside accounting firm in which a member of his immediate family is a principal, without disclosing that relationship to the Members.

Members' demand for an accounting:

46. By certified letter dated November 18, 2013, the Members demanded access to the Company's books and records since November 2009, when Varughese began serving as Managing Member, in order to obtain an audit of its finances.

47. Varughese has failed and refused to deliver the Company's books and records in compliance with the Members' demand.

Sale of the Property:

48. By Resolution dated February 8, 2014, the Members approved the Company's sale of the Property for $200,000. The purchaser was Davis Fowler Group, LLC, which had acquired the Mortgage from AYD Development LLC, which had acquired the Mortgage from VFC Partners 4 LLC. The Company's total loss on its $4.4 million initial investment in the Property is thus not less than $4.2 million, plus lost rental income.

49. Pursuant to the same Resolution, the Members authorized John, as the Company's majority Member, to act on its behalf in connection with that transaction, with the sale proceeds to be held in escrow and ultimately distributed to each Member, *pro rata.*

Retention of Company funds:

50. According to his own Spreadsheet, Varughese is still holding $57,187.60 in Company funds. Upon information and belief, certain Members have asked Varughese to confirm that these funds are still in his possession, and to place them in escrow for the benefit of all Members.

51. Varughese's only response to these requests has been to condition his return of the funds on a deduction of his own membership share of proceeds from the sale of the Property.

AS AND FOR A FIRST CAUSE OF ACTION

(gross negligence)

52. Plaintiff incorporates by reference each and every allegation set forth in paragraphs 1-51 above.

53. Having voluntarily assumed the role of Manager in November 2009, Varughese owed the Company a duty of care in the exercise of his managerial responsibilities, including but

not limited to an accurate, realistic representation of his qualifications and experience in the field of property management.

54. By his material actions and omissions, as set forth above, including but not limited to permitting the Company's hazard insurance to be cancelled without ensuring that it be restored, thereby leaving the Company uninsured as of the Fire on May 31, 2011, and other irregularities described above including various "tax penalties," unexplained legal expenses, uncollected and/or unreported security deposits, and allowing of the Company's Debt to lapse into foreclosure, Varughese grossly violated his duty of care.

55. By reason of Varughese's actions, inactions and omissions, all in gross dereliction of his duty of care as the Company's Managing Member between November 2009 and May 2013, and upon information and belief for his own personal benefit, the Company has incurred losses in an amount to be proven at trial.

AS AND FOR A SECOND CAUSE OF ACTION

(breach of fiduciary duty)

56. Plaintiff incorporates by reference each and every allegation set forth in paragraphs 1-51 and 53-55 above.

57. Having voluntarily assumed the role of Managing Member in November 2009, Varughese owed the Company, and continues to owe it, owe it, a fiduciary duty of loyalty and good faith to act solely in its best interests, without regard to personal gain.

58. By his conduct, as set forth above, Varughese has destroyed the Company's ability to function as an operating entity, ultimately causing it to have to sell the Property, its only income- producing asset, for nominal value at a fraction of its original cost.

59. By reason thereof, Varughese has caused the Company to incur damages in an amount to be proven at trial.

AS AND FOR A THIRD CAUSE OF ACTION

(waste)

60. Plaintiff incorporates by reference each and every allegation set forth in paragraphs 1-51, 53-55 and 57-59 above.

61. Varughese has wasted the Company's assets and destroyed their value, in an amount to be proven at trial.

AS AND FOR A FOURTH CAUSE OF ACTION

(misrepresentation)

62. Plaintiff incorporates by reference each and every allegation set forth in paragraphs 1-51, 53-55, 57-59 and 61 above.

63. By (among other things) his purposeful omissions from the Spreadsheet, purposeful exclusion of John from the Meeting, failure to disclose the Fire and its ensuing losses, the status of the Company's Debt and the Foreclosure Action, and failure to provide operational reports during his tenure as Managing Member, Varughese intentionally concealed and misrepresented the Company's true financial condition to its Members.

64. Upon information and belief, the foregoing material actions and omissions by Varughese were made with the specific intent to defraud the Company and its Members.

65. The Members reasonably relied upon Varughese's assurances and statements as to the Company's financial condition, to its and their detriment.

66. By reason thereof, the Company has been caused to incur operating losses and eventual loss of the Property, in an amount to be determined at trial.

AS AND FOR A FIFTH CAUSE OF ACTION

(accounting)

67. Plaintiff incorporates by reference each and every allegation set forth in paragraphs 1-51, 53-55, 57-59 and 63-66 above.

68. As set forth above, Varughese has violated, and continues to violate, fiduciary obligations of loyalty and good faith to the Company.

69. By reason thereof, the Company's Members are entitled to an accounting of all revenues, expenses, distributions, and all other incoming or outgoing payments since November 2009, with full access to the Company's financial and statements, and all other business records, since Varughese assumed the role of Managing Member.

70. Varughese has failed and refused to deliver such an accounting, despite due demand.

WHEREFORE, plaintiff Thomas John respectfully demands judgment, derivatively upon behalf of the Company, Dutchess Gardens Realty, LLC, as follows:

(i) on the First Cause of Action, damages in an amount to be proven at trial;

(ii) on the Second Cause of Action, damages in an amount to be proven at trial;

(iii) on the Third Cause of Action, damages in an amount to be proven at trial;

(iv) on the Fourth Cause of Action, damages in an amount to be proven at trial; and

[BALANCE OF THIS PAGE INTENTIONALLY LEFT BLANK]

(v) on the Fifth Cause of Action, an accounting of the Company's operations since November 2010, with immediate access to all books and records in the possession of defendant George Varughese or persons under his control;

together with such other and further relief as the Court shall deem just and proper.

Dated: Carle Place, New York
April 13, 2015

STEVEN COHN, P.C.
Attorneys for plaintiff Thomas John,
suing derivatively on behalf of
Dutchess Gardens Realty, LLC

By: _____
JEFFREY H. WEINBERGER

One Old Country Road, Suite #420
Carle Place, NY 11514
(516) 294-6410

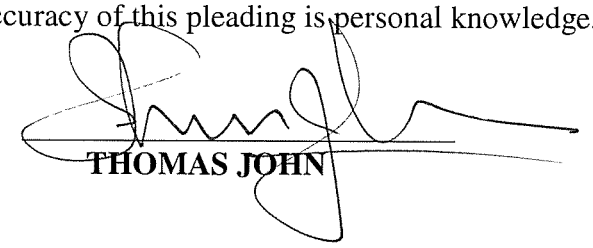
VERIFICATION

THOMAS JOHN, being duly sworn, deposes and says:

1. I am the majority member of Dutchess Gardens Realty, LLC, and the plaintiff in this action.

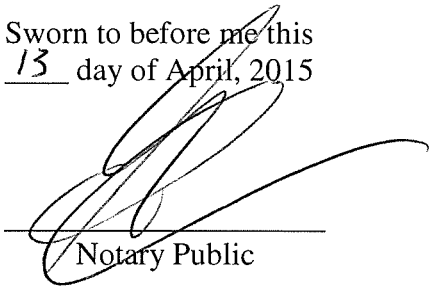
2. I have reviewed the foregoing Complaint, and am familiar with its allegations. I believe all allegations set forth in this Complaint to be true except matters alleged upon information and belief, and as to those matters I believe them to be true.

3. The basis for my belief in the accuracy of this pleading is personal knowledge.



THOMAS JOHN

Sworn to before me this
13 day of April, 2015



Notary Public

GEORGIA GEHRLING
Notary Public, State of New York
No. 01GE4516544
Qualified in Nassau County
Commission Expires May 31, 20 18

Index No: **Year: 2015**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

THOMAS JOHN, derivatively on behalf of DUTCHES GARDENS REALTY, LLC,
Plaintiff,

-against-

GEORGE VARUGHESE, C.P.A.,

Defendant.

SUMMONS AND VERIFIED COMPLAINT

Law Office of STEVEN COHN, P.C.
Attorneys for Plaintiff
One Old Country Road
Suite 420
Carle Place, New York 11514
Phone: (516) 294-6410
Fax: (516) 294-0094

To:

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated: .....
Attorney(s) for

PLEASE TAKE NOTICE

___ **that the within is a (certified) true copy of a**
entered in the office of the clerk of the within named Court on 20

___ **that an Order of which the within is a true copy will be presented for settlement to the Hon.**
one of the judges of the within named Court,
at
on 20 , at M.

Dated: